

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

NO. 03-C-104

SHERRY HIEBER, EXECUTRIX OF THE ESTATE OF CRAIG HIEBER,
AND SHERRY HIEBER, INDIVIDUALLY AND ON BEHALF OF
EDWARD HIEBER AND JANA HIEBER

V.

THOMAS F. D'APRIX, M.D., GRANITE STATE EMERGENCY ROOM
PHYSICIANS, AND CATHOLIC MEDICAL CENTER

ORDER

Following a telephonic conference with counsel held on February 7, 2005, in the above matter, the court granted plaintiff's request that the order of this court dated October 31, 2003, which has been placed on the New Hampshire Judicial Branch website be redacted in certain respects. Accordingly, the court orders that the original order be removed from the website and be replaced with the following redacted order. The portions of the original order which have been redacted are indicated by the following notation within the body of the order: "[redacted material]." By agreement of the parties, the original order is hereby ordered to be sealed; it may be accessed under the procedures set forth in Petition of Keene Sentinel, 136 N.H. 121 (1992).

So ordered.

February 9, 2005

ROBERT J. LYNN
Chief Justice

MEMORANDUM ORDER

LYNN, J.

This is a medical negligence action arising out of allegedly substandard care and treatment received by plaintiff's decedent, Craig Hieber, at the emergency department of Catholic Medical Center (CMC) on July 18, 2002. In addition to the claim for negligent treatment of Mr. Hieber, the decedent's wife, plaintiff Sherry Hieber, also seeks to recover in her own right and on behalf of her children for severe emotional harm manifested by

physical symptoms sustained by them as a result of witnessing the negligent treatment provided to Mr. Hieber. Presently before the court is defendants' Motion to Dismiss for Failure to Produce Properly Executed Releases for the Plaintiffs' Medical Records. Although I agree with plaintiff that, at this point, dismissal is not an appropriate remedy, I also find that plaintiff must execute the releases sought by defendants.

Defendants seek an order compelling plaintiff to execute unrestricted releases which would permit defendants to obtain directly from the medical care providers records concerning prior medical care and treatment provided to Mr. Hieber, Mrs. Hieber, and the Hiebers' two children, Edward and Jana. Plaintiff objects to providing such releases, claiming this request exceeds the proper scope of discovery and that the information at issue is privileged. See RSA 329:26 (Supp. 2002); RSA 330-A:32 (Supp. 2002); N.H.R.E. 503.

Dealing first with the records of the decedent, I find that, by instituting this litigation, plaintiff has placed Mr. Hieber's general medical history at issue, at least for a reasonable period of time prior to the allegedly negligent treatment rendered by the defendants. See Nelson v. Lewis, 130 N.H. 106, 110 (1987) (holding that, by instituting claim for medical negligence, a plaintiff partially waives the physician-patient privilege, the waiver being limited to "what is relevant to plaintiff's claim"). Discovery provided thus far indicates that Mr. Hieber was treated by a number of other physicians prior to his visit to CMC on July 18th. Records of these providers is "relevant to the subject matter involved in the pending litigation" or "reasonably calculated to lead to the discovery of admissible evidence," Super. Ct. R. 35(b)(1), in at least two ways. First, such records may contain information indicating that the decedent suffered from a medical condition related to the condition that ultimately caused his death, and thus could have a direct bearing on the issues of negligence and causation in this case. Second, even medical records regarding conditions that are unrelated to that which caused Mr. Hieber's death could well be relevant on the

issue of damages. Plaintiff seeks general damages for pain and suffering and loss of enjoyment of life by Mr. Hieber. By making such a claim, plaintiff, in effect, asks the jury to measure what Mr. Hieber's life would have been like had it not been for defendants' negligence, and to compensate his estate for that loss. If, for example, the medical records disclose that Mr. Hieber had a pre-existing condition that caused him substantial pain or that limited his ability to engage in certain life activities, or if the records were to reveal that he suffered from problems with drugs, alcohol, depression, etc., that could be found by a jury to reduce the "value" of his prior life and thus would reduce the amount of damages his estate sustained. See McLaughlin v. Fisher Engineering, ___ N.H. ___, No. 2002-770 (Oct. 27, 2003), slip op. at 4 [redacted material].

The above analysis is also applicable to medical records of Mrs. Hieber and the children for a reasonable period of time prior to July 18, 2002. By making claims for emotional distress damages which caused physical symptoms, Mrs. Hieber and the children have placed both their emotional history and their physical history at issue. Thus, if the medical records of Mrs. Hieber disclose that she experienced a traumatic event prior to witnessing the treatment rendered to her husband by the defendants, that could provide an alternative explanation for her emotional upset. Similarly, if she or one of the children sustained a physical injury or illness of some kind, that could provide an alternative explanation for [redacted material] her emotional upset [redacted material].

I next address the issue of whether defendants should be entitled to obtain releases allowing their counsel to obtain the medical records at issue directly from the health care providers. Having concluded that all medical records of Mr. Hieber, Mrs Hieber and the children for a reasonable period of time prior to July 18, 2002, are discoverable by defendants, I further find that defendants are entitled to obtain the records in question directly from the providers. While I do not for a moment question the integrity of plaintiff or her counsel, under our adversary system of justice it is simply inappropriate to require

defendants to accept the say-so of plaintiff or her counsel as their only assurance that they have received a complete set of the discoverable records. Furthermore, because all medical records for the applicable time frame are discoverable, there is simply no reason for requiring that such records be screened by or pass through the hands of plaintiff or her counsel prior to their being disclosed to defendants' counsel. Plaintiff is of course entitled to receive, directly from the providers, her own complete copy of all records which each provider submits to the defendants; and, if plaintiff so desires, she can arrange to receive her copies from the providers a reasonable time before the defendants receive their copies of the records (so that plaintiff and her counsel will know in advance exactly what records defendants will be receiving).

In addition, because the medicals records at issue are privileged except insofar as the privilege has been waived by the filing of the instant lawsuit, I also impose the following protective order. All medical records received by the defendants or their counsel pursuant to this order shall be used by them only in connection with this litigation. Said records shall not be disclosed to anyone other than as may be necessary in connection with the prosecution or defense of any claim involved in this litigation and any person to whom said records are disclosed shall be made aware of the contents of this order and shall sign a written acknowledgement agreeing to comply with its terms. At the conclusion of this case, defendants shall provide the court with one complete set of all the records received by them pursuant to this order and shall return to plaintiff all additional copies of said records which they may have made. The copy furnished to the court shall be placed under seal so as to be available to the supreme court in the event of an appeal. It also must be noted that this order does not constitute a ruling on the admissibility at trial of any information produced to the defendants pursuant to the order.

Lastly, I find that a time frame of ten (10) years prior to July 18, 2002, represents a reasonable historical period for which defendants should be entitled to examine the health

care records of Mr. Hieber, Mrs. Hieber and the children. It is reasonable to assume that any health care conditions of these individuals which could potentially have a bearing on any of the liability or damages issues in this case would be reflected in records covering this time span. If examination of the records for this period suggests that earlier medical records may contain information pertinent to any issues in this case, defendants may file a motion seeking additional disclosures.

For the reasons stated above, it is hereby ordered that within twenty (20) days of the date of this order plaintiff shall provide defendants with a full and complete list of all health care providers who have examined or provided care and treatment of any kind to Mr. Hieber, Mrs. Hieber and the Hieber children from July 1, 1992 to the present time. For each such provider, the plaintiff shall execute unrestricted releases allowing defendants' counsel to obtain directly from the providers any and all health care records of the aforesaid individuals for the covered time period. The records so provided shall be subject to the terms of the protective order specified above.

So ordered.

October 31, 2003

ROBERT J. LYNN
Associate Justice